

# STATE OF NEW YORK

4370--B

2021-2022 Regular Sessions

## IN SENATE

February 3, 2021

Introduced by Sens. BIAGGI, BROOKS, BROUK, COMRIE, GAUGHRAN, HOYLMAN, LIU, MANNION, MAY, MYRIE, RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- recommitted to the Committee on Health in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public health law, in relation to preserving access to affordable drugs

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article 2-A of the public health law is amended by adding a new title IV to read as follows:

### TITLE IV

#### PRESERVING ACCESS TO AFFORDABLE DRUGS

##### Section 282. Definitions.

##### 283. Preserving access to affordable drugs.

§ 282. Definitions. For the purposes of this title, the following terms shall have the following meanings:

1. "ANDA" shall mean abbreviated new drug application as described by 505(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 335(j).

2. "ANDA filer" shall mean a party that owns or controls an ANDA filed with the federal food and drug administration or has the exclusive rights under that ANDA to distribute the ANDA product.

3. "Agreement" shall mean anything that would constitute an agreement under state law.

4. "Agreement resolving or settling a patent infringement claim" includes any agreement that is entered into within thirty days of the resolution or the settlement of the claim, or any other agreement that is contingent upon, provides a contingent condition for, or is otherwise

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD04644-04-2

1 related to the resolution or settlement of the claim. This shall  
2 include, but is not limited to, the following:

3 (a) Any agreement required to be provided to the federal trade commis-  
4 sion or the antitrust division of the United States Department of  
5 Justice under the Medicare Prescription Drug, Improvement, and Modern-  
6 ization Act of 2003, Pub. L. No. 108-173;

7 (b) Any agreement between a biosimilar or interchangeable product  
8 applicant and a reference product sponsor under the Biologics Price  
9 Competition and Innovation Act of 2009, Pub. L. No. 111-148, that  
10 resolves patent claims between the applicant and sponsor.

11 5. "Biosimilar biological product application filer" shall mean a  
12 party that owns or controls a biosimilar biological product application  
13 filed with the federal food and drug administration pursuant to section  
14 351(k) of the Public Health Service Act, 42 U.S.C. 262(k), for licensure  
15 of a biological product as biosimilar to, or interchangeable with, a  
16 reference product, or that has the exclusive rights under the applica-  
17 tion to distribute the biosimilar biological product.

18 6. "NDA" shall mean a new drug application.

19 7. "Nonreference drug filer" shall mean either:

20 (a) An ANDA filer;

21 (b) A company that seeks an abbreviated approval pathway for its drug  
22 product under 505(b)(2) of the Federal Food, Drug, and Cosmetic Act, 21  
23 U.S.C. 355(b)(2); or

24 (c) A biosimilar biological product application filer, or company  
25 seeking FDA approval for a biosimilar under 42 U.S.C. 262.

26 8. "Nonreference drug product" shall mean the product to be manufac-  
27 tured under an ANDA or an application filed under section 505(b)(2) of  
28 the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355(b), that is the  
29 subject of the patent infringement claim, a biosimilar biological prod-  
30 uct that is the product to be manufactured under the biosimilar biolog-  
31 ical product application that is the subject of the patent infringement  
32 claim, or both.

33 9. "Patent infringement" shall mean infringement of any patent or of  
34 any filed patent application, extension, reissue, renewal, division,  
35 continuation, continuation in part, reexamination, patent term restora-  
36 tion, patents of addition, and extensions thereof.

37 10. "Patent infringement claim" shall mean any allegation made to a  
38 nonreference drug filer, whether or not included in a complaint filed  
39 with a court of law, that its nonreference drug product or application  
40 infringes any patent held by, or exclusively licensed to, the reference  
41 drug holder.

42 11. "Reference drug holder" shall mean either:

43 (a) A brand holder that is any of the following:

44 (i) The holder of an approved NDA for a drug product application filed  
45 under section 505(b) of the Federal Food, Drug, and Cosmetic Act, 21  
46 U.S.C. 355(b);

47 (ii) A person owning or controlling enforcement of the patent listed  
48 in the approved drug products with therapeutic equivalence evaluations  
49 in connection with the NDA; or

50 (iii) The predecessors, subsidiaries, divisions, groups, and affil-  
51 iates controlled by, controlling, or under common control with, any of  
52 the entities described in subparagraph (i) or (ii) of this paragraph,  
53 with control to be presumed by direct or indirect share ownership of  
54 fifty percent or greater, as well as the licensees, licensors, succes-  
55 sors, and assigns of each of those entities; or

1 (b) A biological product license holder, which shall mean any of the  
2 following:

3 (i) The holder of an approved biological product license application  
4 for a biological drug product under section 351(a) of the Public Health  
5 Service Act, 42 U.S.C. 262(a);

6 (ii) A person owning or controlling enforcement of any patents that  
7 claim the biological product that is the subject of the approved biolog-  
8 ical patent license application; or

9 (iii) The predecessors, subsidiaries, divisions, groups, and affil-  
10 iates controlled by, controlling, or under common control with, any of  
11 the entities described in subparagraph (i) or (ii) of this paragraph,  
12 with control to be presumed by direct or indirect share ownership of  
13 fifty percent or greater, as well as the licensees, licensors, succes-  
14 sors, and assigns of each of those entities.

15 12. "Reference drug product" shall mean the product to be manufactured  
16 by the reference drug holder and includes both branded drugs of the NDA  
17 holder and the biologic drug product of the biologic product license  
18 applicant.

19 13. "Statutory exclusivity" shall mean those prohibitions on the  
20 approval of drug applications under clauses (ii) through (iv) of section  
21 505(c)(3)(E), section 527 or section 505A of the Federal Food, Drug, and  
22 Cosmetic Act, 21 U.S.C. 355(c)(3)(E), on the licensing of biological  
23 product applications under section 262(k)(7) of Title 42 of the United  
24 States Code or section 262(m)(2) or (3) of Title 42 of the United States  
25 Code.

26 § 283. Preserving access to affordable drugs. 1. (a) Except as  
27 provided in paragraph (c) of this subdivision, an agreement resolving or  
28 settling, on a final or interim basis, a patent infringement claim, in  
29 connection with the sale of a pharmaceutical product, shall be presumed  
30 to have anticompetitive effects and shall be a violation of this section  
31 if both of the following apply:

32 (i) A nonreference drug filer receives anything of value from another  
33 company asserting patent infringement, including, but not limited to, an  
34 exclusive license or a promise that the brand company will not launch an  
35 authorized generic version of its brand drug; and

36 (ii) The nonreference drug filer agrees to limit or forego research,  
37 development, manufacturing, marketing, or sales of the nonreference drug  
38 filer's product for any period of time.

39 (b) As used in subparagraph (i) of paragraph (a) of this subdivision,  
40 "anything of value" shall be interpreted broadly to include any type of  
41 consideration, value or benefit a reference drug holder or nonreference  
42 drug filer could possibly obtain from the agreement. "Anything of value"  
43 shall not include a settlement of patent infringement claims in which  
44 the consideration granted by the reference drug holder to the nonrefer-  
45 ence drug filer as part of the resolution or settlement consists of only  
46 one or more of the following:

47 (i) The right to market the competing product in the United States  
48 before the expiration of either:

49 (A) A patent that is the basis for the patent infringement claim; or

50 (B) A patent right or other statutory exclusivity that would prevent  
51 the marketing of the drug;

52 (ii) A covenant not to sue on a claim that the nonreference drug prod-  
53 uct infringes a United States patent;

54 (iii) Compensation for saved reasonable future litigation expenses of  
55 the reference drug holder but only if both of the following are true:

1 (A) The total compensation for saved litigation expenses is reflected  
2 in budgets that the reference drug holder documented and adopted at  
3 least six months before the settlement; and

4 (B) The compensation shall not exceed the lower of the following:

5 (1) Seven million five hundred thousand dollars; or

6 (2) Five percent of the revenue that the nonreference drug filer  
7 projected or forecasted it would receive in the first three years of  
8 sales of its version of the reference drug documented at least twelve  
9 months before the settlement. If no projections or forecasts are avail-  
10 able, the compensation shall not exceed two hundred fifty thousand  
11 dollars;

12 (iv) An agreement by the reference drug holder not to interfere with  
13 the nonreference drug filer's ability to secure and maintain regulatory  
14 approval to market the nonreference drug product or an agreement to  
15 facilitate the nonreference drug filer's ability to secure and maintain  
16 regulatory approval to market the nonreference drug product; or

17 (v) An agreement resolving a patent infringement claim in which the  
18 reference drug holder forgives the potential damages accrued by a  
19 nonreference drug filer for an at-risk launch of the nonreference drug  
20 product that is the subject of that claim.

21 (c) Parties to an agreement are not in violation of paragraph (a) of  
22 this subdivision if they can demonstrate by clear and convincing  
23 evidence that either of the following are met:

24 (i) The value received by the nonreference drug filer described in  
25 subparagraph (i) of paragraph (a) of this subdivision is a fair and  
26 reasonable compensation solely for other goods or services that the  
27 nonreference drug filer has promised to provide; or

28 (ii) The agreement has directly generated procompetitive benefits and  
29 the procompetitive benefits of the agreement outweigh the anticompet-  
30 itive effects of the agreement.

31 2. In determining whether the parties to the agreement have met their  
32 burden under paragraph (c) of subdivision one of this section, a court  
33 of competent jurisdiction shall not consider any of the following:

34 (a) That entry into the marketplace could not have occurred until the  
35 expiration of the relevant patent exclusivity or that the agreement's  
36 provision for entry of the nonreference drug product before the expira-  
37 tion of any patent exclusivity means that the agreement is procompet-  
38 itive within the meaning of subparagraph (ii) of paragraph (c) of subdivi-  
39 vision one of this section;

40 (b) That any patent is enforceable and infringed by the nonreference  
41 drug filer in the absence of a final adjudication binding on the filer  
42 of those issues;

43 (c) That the agreement caused no delay in entry of the nonreference  
44 drug filer's drug product because of the lack of Federal Food and Drug  
45 Administration (FDA) approval of that or of another nonreference drug  
46 product; or

47 (d) That the agreement caused no harm or delay due to the possibility  
48 that the nonreference drug filer's drug product might infringe some  
49 patent that has not been asserted against the nonreference drug filer or  
50 that is not subject to a final and binding adjudication on that filer as  
51 to the patent's scope, enforceability, and infringement.

52 3. In determining whether the parties to the agreement have met their  
53 burden under paragraph (c) of subdivision one of this section, a court  
54 of competent jurisdiction shall presume that the relevant product market  
55 is that market consisting of the reference drug of the company alleging  
56 patent infringement and the drug product of the nonreference drug filer

1 accused of infringement and any other biological product that is  
2 licensed as biosimilar or is an AB-rated generic to the reference prod-  
3 uct.

4 4. (a) This section shall not modify, impair, limit, or supersede the  
5 applicability of the antitrust laws of the state pursuant to article  
6 twenty-two of the general business law, unfair competition laws of the  
7 state pursuant to article twenty-two-A of the general business law or  
8 the availability of damages or remedies provided therein. This section  
9 shall not modify, impair, limit, or supersede the right of any drug  
10 company applicant to assert claims or counterclaims against any person,  
11 under the antitrust laws or other laws relating to unfair competition of  
12 the federal antitrust law or state law.

13 (b) If any provision of this subdivision, an amendment made to this  
14 subdivision, or the application of any provision or amendment to any  
15 person or circumstance is held to be unconstitutional, the remainder of  
16 this subdivision, the amendments made to this subdivision, and the  
17 application of the provisions of this subdivision or amendments to any  
18 person or circumstance shall not be affected.

19 5. (a)(i) Each person that violates or assists in the violation of  
20 this section shall forfeit and pay to the state a civil penalty suffi-  
21 cient to deter violations of this section, as follows:

22 (A) If the person who violated this section received any value due to  
23 that violation, an amount up to three times the value received by the  
24 party that is reasonably attributable to the violation of this section,  
25 or twenty million dollars, whichever is greater; or

26 (B) If the violator has not received anything of value as described in  
27 this subparagraph, an amount up to three times the value given to other  
28 parties to the agreement reasonably attributable to the violation of  
29 this section, or twenty million dollars.

30 (C) For purposes of this subdivision, "reasonably attributable to the  
31 violation" shall be determined by the state's share of the market for  
32 the brand drug at issue in the agreement.

33 (ii) Any penalty described in subparagraph (i) of this paragraph shall  
34 accrue only to the state and shall be recovered in a civil action  
35 brought by the attorney general in its own name, or by any of its attor-  
36 neys designated by it for that purpose, against any party to an agree-  
37 ment that violates this section.

38 (b) Each party that violates or assists in the violation of this  
39 section shall be liable for any damages, penalties, costs, fees, injunc-  
40 tions, or other equitable or legal remedies, including, but not limited  
41 to, restitution and disgorgement, that may be just and reasonable. Such  
42 remedies shall include, but not be limited to, any remedy available  
43 under articles twenty-two or twenty-two-A of the general business law  
44 and section sixty-three of the executive law.

45 (c) If the state is awarded penalties under subparagraph (i) of para-  
46 graph (a) of this subdivision, it shall not recover penalties pursuant  
47 to another law identified in paragraph (b) of this subdivision. This  
48 section shall not be construed to foreclose the state's ability to claim  
49 any equitable or legal remedy available in paragraph (b) of this subdivi-  
50 vision.

51 (d) An action to enforce a cause of action for a violation of this  
52 section shall be commenced within six years after the cause of action  
53 accrued.

54 § 2. Severability clause. If any clause, sentence, paragraph, subdivi-  
55 sion, section or part of this act shall be adjudged by any court of  
56 competent jurisdiction to be invalid or unenforceable, such judgment

1 shall not affect, impair, or invalidate the remainder thereof, but shall  
2 be confined in its operation to the clause, sentence, paragraph, subdi-  
3 vision, section or part thereof directly involved in the controversy in  
4 which such judgment shall have been rendered. It is hereby declared to  
5 be the intent of the legislature that this act would have been enacted  
6 even if such invalid provisions had not been included herein.  
7 § 3. This act shall take effect on the sixtieth day after it shall  
8 have become a law.